



United States
Department of
Agriculture

Farmers
Home
Administration

Washington
D.C.
20250

FmHA AN No. 2077 (1951)

April 11, 1990

SUBJECT: Information Needed in Denial of a Borrower's Loan
Servicing Request Based on a Lack of Good Faith

TO: State Directors, District Directors and County
Supervisors

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to clarify the information that is necessary to determine whether the borrower is ineligible for Primary Loan Servicing options based on a lack of good faith due to fraud, waste, or conversion. The attached GUIDE or a substitute approved by your Regional Attorney, Office of the General Counsel (OGC), should be used when requesting a written legal opinion from the OGC to substantiate allegations of fraud, waste, or conversion. The intended outcome is to assure that sufficient documentation is compiled when servicing borrowers in non-monetary default because of fraud, waste, or conversion.

COMPARISON WITH PREVIOUS AN:

This AN updates and replaces Farmers Home Administration (FmHA) AN No. 1877(1951), which expired on December 31, 1989. The updates in this AN clarify the actions to be taken prior to mailing Attachments 3 and 4 of Exhibit A to FmHA Instruction 1951-S to the borrower.

IMPLEMENTATION RESPONSIBILITIES:

In cases where FmHA will be notifying a borrower of non-monetary default due to fraud, waste, or conversion, the attached GUIDE or an OGC approved substitute will be completed to determine if there is enough documentation to justify the allegations of fraud, waste or conversion.

EXPIRATION DATE: January 31, 1991

FILING INSTRUCTIONS:
Preceding FmHA
Instructions 1951-S



Farmers Home Administration is an Equal Opportunity Lender.
Complaints of discrimination should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

The attached GENERAL GUIDELINES set out the elements of fraud, waste, and conversion which the OGC will use to render its opinion. This documentation will be obtained PRIOR to mailing Attachments 3 and 4 to Exhibit A of FmHA Instruction 1951-S.

For those borrowers in non-monetary default based on a lack of good faith in meeting agreements made on Form FmHA 1962-1, "Agreement for the Use of Proceeds/Release of Chattel Security," or any other agreements made with FmHA, the County Supervisor should thoroughly document the facts in the running case record PRIOR to mailing Attachments 3 and 4 to Exhibit A of FmHA Instruction 1951-S. If problems are encountered, the OGC may be contacted for advice. An OGC opinion is not required in these cases. However, a lack of good faith based on a combination of reasons, (for example, conversion and a breach of an agreement), will be supported by an OGC opinion for the conversion.



LA VERNE AUSMAN
Administrator

Attachments

Sent by Time Delay Option to States at 4:00pm on 4/12/90 to Districts at 9:00am on 4/13/90, and Counties at 11:00am on 4/13/90 by ASD.

G E N E R A L G U I D E L I N E S
D E T E R M I N A T I O N O F T H E
L A C K O F G O O D F A I T H B E C A U S E O F F R A U D , W A S T E , A N D C O N V E R S I O N

The following are the general elements of fraud, waste, and conversion which will be used by the Office of the General Counsel (OGC) in rendering its opinion in the possible denial of a borrower's request for Primary Loan Servicing, as required by 7 CFR Section 1951.909(c)(2). Please bear in mind that these are general elements only, and are furnished for Farmers Home Administration's (FmHA) preliminary analysis only. The particular situation relative to the law will dictate the contents of OGC's opinion in each individual case. Each OGC office should refer to applicable State law in determining whether the necessary elements have been met in each case.

E L E M E N T S

FRAUD:

- (1) A false representation or omission of fact,
- (2) Material fact,
- (3) Borrower's knowledge of its falsity,
- (4) Borrower's intent that the representation or, omission should be acted on by FmHA,
- (5) FmHA's ignorance of its falsity,
- (6) FmHA's reliance on the representation or omission, and
- (7) FmHA's consequent and proximate injury or damage

WASTE:

- (1) Unlawful act or omission on part of borrower,
- (2) Affects FmHA security,
- (3) Results in permanent injury to FmHA security, and
- (4) Borrower is in lawful possession of FmHA security

- May be:
- (a) Active waste - intentional destruction of FmHA security,
 - (b) Permissive waste - allowing death, decay deterioration, disrepair, or destruction FmHA security through inexcusable neglect or negligence, or
 - (c) Equitable waste - allowing death, decay, deterioration, disrepair, or destruction of FmHA security by not following management practices that a prudent person would have followed under similar circumstances

CONVERSION:

- (1) Valid lien by FmHA in security,
- (2) Willful and/or malicious disposal of security by debtor(s),
- (3) Failure to obtain consent of disposal from FmHA, and
- (4) Injury to FmHA

G U I D E
QUESTIONNAIRE TO BE COMPLETED AND FURNISHED TO THE
OFFICE OF THE GENERAL COUNSEL WHEN SEEKING OPTIONS ON
DENIAL OF REQUESTS FOR PRIMARY LOAN SERVICING PROGRAMS
ON THE BASIS OF FRAUD, WASTE, OR CONVERSION

I. FRAUD: Are you making an allegation that the borrower is not in good faith because of fraud against FmHA? Yes _____ No _____ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)

A. Did the borrower make a false representation to FmHA? Yes _____ No _____ (If yes, specifically set out the false representation or attach a copy if written.)

B. Was the false representation material to FmHA's decision to provide the borrower with a loan, or to restructure, refinance, or compromise an existing loan? Yes _____ No _____ (If yes, specifically set out the importance of the false representation.)

C. Did the borrower know that the information was false or did the borrower intentionally omit material information? Yes _____ No _____ (If yes, specifically set out why you think the borrower had knowledge of the false information on intended to omit material information.)

D. Did FmHA know at the time that the representation or omission made was false and intentional? Yes _____ No _____ (If no, when did FmHA learn of the false representation or omission of fact)

E. Did FmHA rely on the false representation or omission of material fact when FmHA loaned the borrower money, or to restructure, refinance, or compromise an existing loan? Yes _____ No _____ (Specifically set out the basis for your opinion.)

- F. What was the date of the alleged fraud? _____
- G. Set out specifically the injury FmHA suffered because of the false representation or omission of material fact.

- H. What actions did FmHA take once the alleged fraud was discovered? _____

- I. Other facts for OGC to consider in its analysis: _____

II. WASTE: Are you making an allegation that the borrower is not in good faith because of waste against FmHA's security? Yes _____ No _____ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)

- A. If real estate security was involved, was the borrower in lawful possession of FmHA security? _____

- B. Did the borrower actively destroy all or part of the FmHA's security? Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.) _____

- C. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FmHA security through inexcusable neglect or negligence? Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.) _____

- D. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FmHA security by not following management practices that a prudent person would have followed under similar circumstances? Yes _____ No _____ (If yes, specifically set out the facts supporting your opinion.) _____

- E. When did the alleged waste take place? _____

- F. What actions did FmHA take once the alleged waste was discovered? _____

- G. What permanent injury was caused to FmHA's security by the alleged act of waste? (Set out in detail the monetary loss suffered by FmHA.) _____

- H. Other facts for OGC to consider in its analysis: _____

III. CONVERSION: Are you making an allegation that the borrower is not in good faith because of conversion of FmHA security? Yes _____ No _____ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)

- A. What was the type and dollar value of the collateral converted? List the approximate dates of conversion and the buyer's identity as near as FmHA knows or can guess.

- B. Was the collateral sold by the borrower without authorization, or was it sold with authorization but the borrower failed to account for the proceeds?

- C. Did the borrower dispose of FmHA's security in conscious and knowing violation of the provisions of all previous agreements, instructions and regulations of FmHA?
Yes _____ No _____ (If yes, specifically set out the basis for your opinion.) _____

- D. What use did the borrower make of the proceeds of the converted items? (If you are not sure, give your best guess and the basis for that opinion.) _____

- E. Are there any aggravating or mitigating circumstances known? Yes _____ No _____ (If yes, specifically set out the basis for your opinion.) _____

- F. What was the date of the last previous security/collateral check by FmHA prior to the alleged act of conversion? (Please summarize the findings of that chattel check.) _____

- G. Had the borrower ever converted collateral before the incident(s) in question? If so, when did it happen, what was involved, and what action did FmHA take? Also, have any new loans been granted to the borrower after the time FmHA became aware of any conversion? _____

- H. What was the actual County Office procedure in granting approval for this borrower to sell collateral - not just what the regulations say? _____

- I. What excuses, statements or confessions did the borrower make regarding the missing collateral? When and to whom were these statements made? _____

- J. Has there been a contract investigation, referral to OGC or OIG on the matter? Yes _____ No _____ (If yes, please state the details of the referral. If no, specifically state why a referral of the conversion was not made.) _____

K. State specifically, the injury FmHA suffered because of alleged conversion of its security. _____

L. Other facts for OGC to consider in its analysis: _____

